

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 20, 2007

JAMES EARL KENNER v. RICKY J. BELL, WARDEN

**Direct Appeal from the Circuit Court for Davidson County
upon Remand from the United States Supreme Court**

No. 05C-189 Walter Kurtz, Judge

No. M2005-00622-CCA-R3-HC - Filed September 13, 2007

Petitioner, James Earl Kenner, appealed to this Court from the trial court's summary dismissal of his petition for habeas corpus relief. We affirmed the dismissal pursuant to Rule 20 of the Rules of the Tennessee Court of Criminal Appeals. *James Earl Kenner v. Ricky J. Bell, Warden*, No. M2005-00622-CCA-R3-HC, 2005 WL 2139402 (Tenn. Crim. App. at Nashville, Aug. 31, 2005), *perm. to app. denied* (Tenn., Dec. 27, 2005). On appeal by permission to the United States Supreme Court, the judgment of this Court was vacated and the case was remanded for further consideration in light of *Cunningham v. California*, 549 U.S. ____, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). *See James Earl Kenner v. Ricky J. Bell, Warden*, 127 S. Ct. 1243 (Mem), 167 L. Ed. 2d 60 (2007). Subsequently counsel was appointed to represent Petitioner. After further briefing by the parties in light of the order of the United States Supreme Court, we have further considered the case and conclude that Petitioner's sentences do not violate the Sixth Amendment to the United States Constitution. In actuality, the sentences imposed upon Petitioner, which he attacks in his habeas corpus petition, are based solely upon the verdict returned by the jury and Petitioner's prior convictions. Accordingly, the sentences were imposed in compliance with the Sixth Amendment, as interpreted in *Cunningham v. California*, and the judgment of the trial court is therefore affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Lindsay C. Barrett, Dickson, Tennessee, for the appellant, James Earl Kenner.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; and Victor S. (Torry) Johnson III, District Attorney General, for the appellee, the State of Tennessee.

OPINION

According to the record on appeal, in August 1994, Petitioner was convicted by a Davidson County jury of five counts of aggravated burglary, a Class C felony, five counts of Class D felony theft, and one count of misdemeanor unlawful possession of a weapon. He was sentenced as a career offender for each felony offense, and was given the maximum sentence of 11 months and 29 days for the misdemeanor conviction. A combination of consecutive and concurrent sentencing resulted in a total effective sentence of seventy-five years.

The convictions and sentences were affirmed on direct appeal. *See State v. James E. Kenner*, No. 01C01-9503-CR-00052, 1996 WL 63868 (Tenn. Crim. App., at Nashville, Feb. 13, 1996), *perm. to app. denied* (Tenn., July 1, 1996). Petitioner subsequently attacked his convictions by a petition for post-conviction relief, which was denied by the trial court. This Court affirmed. *See James E. Kenner v. State*, No. 01C01-9709-CR-00424, 1999 WL 333097 (Tenn. Crim. App., at Nashville, May 26, 1999), *perm. to app. denied* (Tenn., Oct. 4, 1999).

In his petition for habeas corpus relief, Petitioner asserts that he is entitled to relief because his sentences were all enhanced by the trial judge, rather than a jury, in violation of his Sixth Amendment rights as set forth in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). In this appeal, Petitioner argues that he is entitled to relief because the length of the sentences imposed and the imposition of consecutive sentencing, are contrary to law.

Our Supreme Court recently reviewed the applicable law regarding habeas corpus proceedings in *Summers v. State*, 212 S.W.3d 251 (Tenn. 2007), and thoroughly, yet succinctly, summed up the factors and legal conclusions which must be reached in order for a trial court to grant habeas corpus relief. The Court stated that:

[t]he determination of whether habeas corpus relief should be granted is a question of law. *Hart v. State*, 21 S.W.3d 901, 903 (Tenn. 2000). Therefore, our review is de novo with no presumption of correctness given to the findings and conclusions of the lower courts. *State v. Livingston*, 197 S.W.3d 710, 712 (Tenn. 2006).

The right to seek habeas corpus relief is guaranteed by article I, section 15 of the Tennessee Constitution, which states that “the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.” Habeas corpus procedure in Tennessee has been regulated by statute since 1858. *State v. Ritchie*, 20 S.W.3d 624, 629 (Tenn. 2000).

Although no statute of limitations exists for filing a habeas corpus petition, the grounds upon which habeas corpus relief will be granted are narrow. *Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004). Habeas corpus relief is available “only when ‘it appears upon the face of the judgment or the record of the proceedings upon which

the judgment is rendered' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993) (quoting *State v. Galloway*, 45 Tenn. (5 Cold.) 326, 336-37 (Tenn. 1868)). Thus, the writ of habeas corpus will issue only in the case of a void judgment or to free a prisoner after his term of imprisonment or other restraint has expired. *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). Unlike a post-conviction petition, a habeas corpus petition is used to challenge void and not merely voidable judgments. *Id.* A voidable judgment is one that is facially valid and requires proof beyond the face of the record or judgment to establish its invalidity. *Dykes v. Compton*, 978 S.W.2d 528, 529 (Tenn. 1998). A void judgment is one that is facially invalid because the court did not have the statutory authority to render such judgment. *Id.*

Summers, 212 S.W.3d at 255-56.

Unless a sentence that is imposed in violation of a defendant's Sixth Amendment rights causes a judgment to be void, that defendant would not be entitled to state habeas corpus relief. We do not have to reach that issue to reach our disposition of this case. The imposition of the length of each felony sentence was done in full compliance with the dictates of *Blakely* and *Cunningham*. Furthermore, nothing in *Cunningham* and *Blakely* even infer that imposition of consecutive sentences falls under the Sixth Amendment right for jury determination. *See State v. Eric Lumpkins*, No. W2005-02805-CCA-R3-CD, 2007 WL 1651881, at *12 (Tenn. Crim. App., at Jackson, June 7, 2007) *perm. to app. filed*.

Also, this Court has previously held that "[t]he Sixth Amendment concerns expressed in *Blakely* are not implicated by [Tennessee's] misdemeanor sentencing scheme." *State v. Jeffery D. Hostetter*, No. M2003-02839-CCA-R3-CD, 2004 WL 3044895, at *9 (Tenn. Crim. App., at Nashville, Dec. 29, 2004), *perm. to app. denied* (Tenn., May 9, 2005). This is because a misdemeanor sentence, unlike a felony sentence, has only a *maximum* sentence which may be imposed. There is no presumptive sentence, like in felonies, which could not be increased absent findings of enhancement factors.

Regarding Petitioner's sentences for the felony convictions, as noted above, each judgment reflects that he was sentenced to the maximum possible sentence for each felony as a "career offender." At the time that Petitioner was sentenced, Tennessee Code Annotated section 40-35-108(c) provided that "[a] defendant who is found by the court beyond a reasonable doubt to be a career offender *shall* receive the *maximum* sentence within the applicable Range III." *Id.* (emphasis added). Obtaining classification as a "career offender" was based *exclusively* on a defendant's prior convictions. As this Court noted in Petitioner's direct appeal of his convictions, "[h]ere, . . . a maximum Range III sentence for each offense is required by Tenn. Code Ann. § 40-35-108(c) whether or not enhancement factors are applicable." *State v. James E. Kenner*, No. 01C01-9503-CR-00052, 1996 WL 63868 at *4 (Tenn. Crim. App., at Nashville, Feb. 13, 1996), *perm. to app. denied* (Tenn., July 1, 1996).

In *Cunningham v. California*, the United States Supreme Court reaffirmed its prior decisions declaring Sixth Amendment limitations on the enhancement of sentences based upon facts found by a judge rather than a jury. See *Cunningham*, slip op. at 22. As pertinent to Petitioner's case, these decisions are *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). In *Cunningham*, the Court held,

Other than a prior conviction, see Almendarez-Torres v. United States, 523 U.S. 224, 239-247 (1998), we held in *Apprendi*, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. (Emphasis added).

* * *

We have since reaffirmed the rule of *Apprendi*, applying it to facts . . . permitting a sentence in excess of the "standard range" under Washington's Sentencing Reform Act, *Blakely v. Washington*, 542 U.S. 296, 304-305 (2004).

Cunningham, slip op. at 9.

Under the United States Supreme Court's decisions in *Apprendi*, *Blakely*, and *Cunningham*, there is no Sixth Amendment violation by a trial court's use of a defendant's prior convictions to increase the defendant's sentence. The sentences Petitioner received were based solely upon the jury's verdicts of guilt (identifying the class of felony offense) and Petitioner's prior convictions, which statutorily mandated the maximum sentences which Petitioner received. Petitioner's petition for habeas corpus relief was properly dismissed by the trial court.

CONCLUSION

Petitioner's felony sentences which he attacks in his state habeas corpus proceedings were not imposed in violation of his Sixth Amendment rights as declared by the United States Supreme Court in *Cunningham*. Furthermore, Tennessee's misdemeanor sentencing structure does not violate the Sixth Amendment. Accordingly the judgment of the trial court dismissing Petitioner's habeas corpus petition is affirmed.

THOMAS T. WOODALL, JUDGE